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ELECTRONIC FRONTIER FOUNDATION
CINDY COHN (145997)
cindy@eff.org
LEE TIEN (148216)
tien@eff.org
KURT OPSAHL (191303)
kurt@eff.org
KEVIN S. BANKSTON (217026)
bankston@eff.org
CORYNNE MCSHERRY (221504)
corynne@eff.org
JAMES S. TYRE (083117)
jstyre@eff.org
454 Shotwell Street
San Francisco, CA 94110
Telephone: 415/436-9333
415/436-9993 (fax)

TRABER & VOORHEES
BERT VOORHEES (137623)
bv@tvlegal.com
THERESA M. TRABER (116305)
tmt@tvlegal.com
128 North Fair Oaks Avenue, Suite 204
Pasadena, CA 91103
Telephone: 626/585-9611
626/ 577-7079 (fax)

Attorneys for Plaintiffs

[Additional counsel appear on signature page.]

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

TASH HEPTING, GREGORY HICKS, CAROLYN JEWEL and ERIK KNUTZEN, on Behalf of Themselves and All Others Similarly Situated, Plaintiffs, vs. AT&T CORP., et al. Defendants.	No. C-06-00672-VRW CLASS ACTION NOTICE OF MOTION AND ADMINISTRATIVE MOTION TO LODGE DOCUMENTS WITH THE COURT PURSUANT TO CIVIL LOCAL RULES 7-11 AND 79-5

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TO: DEFENDANTS AND THEIR ATTORNEYS OF RECORD

PLEASE TAKE NOTICE that plaintiffs will, and hereby do, move for administrative relief pursuant to Civil Local Rules 7-11 and 79-5(d). Plaintiffs are moving for a preliminary injunction against defendants AT&T Corporation and AT&T Inc. (collectively "AT&T"). In plaintiffs' view, none of the information in plaintiffs' preliminary injunction papers is a trade secret and there is no proper basis for sealing any of the information in plaintiffs' preliminary injunction papers. Nevertheless, in order to allow defendants a reasonable opportunity to review the information and to seek to establish that any portion of it is sealable, plaintiffs are lodging under seal their memorandum of points and authorities and the supporting declarations and exhibits of Mark Klein and J. Scott Marcus. Pursuant to Local Rule 79-5(d), plaintiffs request that the documents they are lodging under seal be unsealed and made part of the public record in this action if after five days defendants do not file a declaration establishing that the documents are properly sealable, or if the Court determines that notwithstanding any such declaration the information is not sealable.

This motion is based on this notice of motion and motion, memorandum of points and authorities, the amended motion for preliminary injunction and all associated papers filed therewith, and the pleadings and papers on file in this action.

I. MEMORANDUM OF POINTS AND AUTHORITIES

A. Background

Plaintiffs are moving for a preliminary injunction against AT&T to enjoin its participation in a massive, government-directed domestic spying scheme. Plaintiffs' motion papers include a supporting memorandum and the supporting declarations and exhibits of Mark Klein and telecommunications network expert J. Scott Marcus. Mr. Klein is a former AT&T employee, and in his declaration he attaches and discusses certain AT&T documents. These documents were imprinted "proprietary" but not "confidential" by AT&T. Telecommunications expert Mr. Marcus discusses these same AT&T documents and Mr. Klein's declaration in his own declaration. Plaintiffs' memorandum in support of their preliminary injunction motion discusses and refers to these AT&T documents and to the Klein and Marcus declarations. Thus, all of the potentially sealable information in plaintiffs' preliminary injunction papers ultimately derives from the Klein declaration and its exhibits.

For the reasons set forth below, none of the information should be sealed. Nevertheless, plaintiffs are lodging under seal their memorandum and the declarations and exhibits of Mr. Klein and Mr. Marcus so that defendants may have a reasonable opportunity to seek to demonstrate under Civil Local Rule 79-5 that any portion of these documents is properly sealable and should be sealed.

There is currently no Rule 26(c) discovery protective order in this action.

B. To Overcome the Strong Presumption of Public Access to Judicial Records, It Is Defendants' Burden to Demonstrate a Compelling Justification for Any Sealing that They Seek

The "presumption of openness . . . is at the foundation of our judicial system" *CBS, Inc. v. United States Dist. Court*, 765 F.2d 823, 826 (9th Cir. 1985) (unanimous opn. by Kennedy, J.). In particular, there is "a strong presumption in favor of access to court records." *Foltz v. State Farm Mut. Auto. Ins. Co.*, 331 F.3d 1122, 1135 (9th Cir. 2003); *see also Nixon v. Warner Commc'ns, Inc.*, 435 U.S. 589, 597-99 (1978) (discussing the common law right of public access).

The presumption of public access to documents filed in judicial proceedings can be overcome only if the party seeking to have them sealed carries the burden of demonstrating "sufficiently compelling reasons for doing so." *Foltz,* 331 F.3d at 1135; *see also id.* at 1130.

The party seeking sealing may not rely on generalized allegations of harm. Instead, it bears the burden of showing, for each particular document that it seeks to have filed under seal, the specific harm that will result if the document is not withheld from public scrutiny. *Foltz,* 331 F.3d at 1130 (party seeking to prohibit public access bears the burden of establishing "specific prejudice or harm" "for each particular document"); *accord* Fed. R. Civ. Proc. 26(c) (discovery protective orders limiting public disclosure may be issued only "for good cause shown" by the party seeking to prohibit disclosure).

The Local Rules likewise put the burden of justifying the sealing on the party seeking to have information sealed. The party seeking sealing must file a declaration establishing that the designated information is sealable, and that any proposed sealing is narrowly tailored. Civil Local Rule 79-5(d). If defendants fail to file a declaration, or file a declaration but fail to carry their burden of establishing that the information should be sealed, then the Court makes the documents part of the public record. *Id*.

If a declaration is filed, the Court must determine whether the reasons given for denying the public the right to access court documents are sufficiently compelling to justify keeping the documents from the public. *Foltz,* 331 F.3d at 1135. In order to find that a document is properly sealable, the Court's order must articulate compelling reasons justifying sealing that are supported by specific factual findings. *Id*.; *Hagestad v. Tragesser*, 49 F.3d 1430, 1434-35 (9th Cir. 1995).

C. Plaintiffs' Preliminary Injunction Papers Should Not Be Sealed Because the Information in Question Is Not a Trade Secret

A trade secret is information that "[d]erives independent economic value, actual or potential, from not being generally known to the public or to other persons who can obtain economic value from its disclosure or use." Cal. Civ. Code §3426.1(d). The information in the Klein declaration and its exhibits is not a trade secret. There is no indication that its economic value, if any, derives from not being generally known to the public or that others could obtain economic value from its disclosure or use.

Moreover, it is generally known that AT&T engages in surveillance of the communications of its customers, including the domestic surveillance on behalf of the National Security Agency that is at issue in this lawsuit. Declaration of Cindy Cohn, Ex. B (Dionne Searcey, Shawn Young, and Amol Sharma, *Wiretapping Flap Puts Phone Firms Under Fire*, Wall St. J., Feb. 7, 2006, at B3). Even if AT&T's surveillance were not generally known and were not known to AT&T's competitors (who themselves are conducting surveillance on behalf of the government, *see id*.), AT&T would derive no "independent economic value" from the secrecy of its surveillance or of the details of how it conducts that surveillance. AT&T enjoys a natural monopoly in the "market" for conducting surveillance on its customers at the government's behest, as its customers' communications necessarily pass through its hands. Its competitors derive no economic value from knowing that AT&T and the government are conducting surveillance of AT&T's customers and cannot seek to usurp AT&T in performing that function.

D. There Is an Overriding Public Interest in Filing These Documents in the Public Record

Even if AT&T could assert some purported private interest in sealing information in the Klein declaration and its exhibits, it still could not carry its heavy burden of justification. There is a great and overriding public interest in the public filing of plaintiffs' preliminary injunction papers because of the great public concern about the question of indiscriminate suspicionless warrantless domestic surveillance that is at the heart of this case. The public right of access to judicial records and proceedings serves many important interests, including the people's interest that decision making by all branches of government be exposed to public scrutiny and political debate, and the people's interest in ensuring that the judicial branch fulfill its role as a check on unbridled executive power. "The Supreme Court has noted that the American view of the right to inspect and copy court documents . . . embraces as an interest compelling disclosure 'the citizen's desire to keep a watchful eye on the workings of public agencies' and 'a newspaper publisher's intention to publish information concerning the operation of government.'" *In re McClatchy Newspapers, Inc.*, 288 F.3d 369, 374 (9th Cir. 2001) (citation omitted). These interests are at their zenith in a lawsuit such as this alleging a program of massive constitutional violations by the highest levels of the executive branch, where this Court will be called upon to examine the legitimacy of the executive's actions.

Judge Easterbrook has well explained the public interest in public access to court filings:

> "Judicial proceedings in the United States are open to the public – in criminal cases by constitutional command, and in civil cases by force of tradition. What happens in the halls of government is presumptively open to public scrutiny. Judges deliberate in private but issue public decisions after public arguments based on public records. The political branches of government claim legitimacy by election, judges by reason. Any step that withdraws an element of the judicial process from public view makes the ensuing decision look more like fiat; this requires rigorous justification."

In re Krynicki, 983 F.2d 74, 75 (7th Cir. 1992) (single-judge opn. by Easterbrook, J., sitting as motions judge) (citations omitted).

Such views are not new:

> "Justice Oliver Wendell Holmes wrote that public access to civil judicial proceedings was 'of vast importance' because of 'the security which publicity gives for the proper administration of justice. . . . It is desirable that the trial of [civil] causes should take place under the public eye, not because the controversies of one citizen with another are of public concern, but because it is of the highest moment that those who administer justice should always act under the sense of public responsibility, and that

> every citizen should be able to satisfy himself with his own eyes as to the mode in which a public duty is performed.' Consistently, [the California Supreme Court in the same era] wrote that '[i]n this country it is a first principle that the people have the right to know what is done in their courts. The old theory of government which invested royalty with an assumed perfection, precluding the possibility of wrong and denying the right to discuss its conduct of public affairs, is opposed to the genius of our institutions in which the sovereign will of the people is the paramount idea; and the greatest publicity to the acts of those holding positions of public trust, and the greatest freedom in the discussion of the proceedings of public tribunals that is consistent with truth and decency are regarded as essential to the public welfare.'"

NBC Subsidiary (KNBC-TV), Inc. v. Superior Court, 20 Cal. 4th 1178, 1198 n.14 (1999). In *NBC*, the California Supreme Court unanimously held that "the First Amendment right of access applies to civil proceedings," *id*. at 1209, and noted that this First Amendment right of access has been extended to court filings as well as to hearings in the courtroom, *id*. at 1208 n.25.

Whatever minimal private interest in sealing that defendants may assert cannot outweigh the need for public access to the evidence on which the Court will base its decision whether to preliminarily enjoin the massive government-directed domestic spying scheme at issue in this case.

II. CONCLUSION

Pursuant to Local Rule 79-5(d), plaintiffs request that the memorandum of points and authorities and the declarations and exhibits of Mark Klein and J. Scott Marcus that they are lodging under seal be unsealed and made part of the public record in this action if five days after the filing of this motion defendants have not filed a declaration in support of sealing. If defendants do file a declaration in support of sealing, plaintiffs respectfully request for the foregoing reasons that the Court deny the proposed sealing and determine that the information is not sealable.

DATED: April 5, 2006

ELECTRONIC FRONTIER FOUNDATION
CINDY COHN
LEE TIEN
KURT OPSAHL
KEVIN S. BANKSTON
CORYNNE MCSHERRY
JAMES S. TYRE

/s/ CINDY COHN
CINDY COHN

454 Shotwell Street
San Francisco, CA 94110
Telephone: 415/436-9333
415/436-9993 (fax)

TRABER & VOORHEES
BERT VOORHEES
THERESA M. TRABER
128 North Fair Oaks Avenue, Suite 204
Pasadena, CA 91103
Telephone: 626/585-9611
626/577-7079 (fax)

LERACH COUGHLIN STOIA GELLER
RUDMAN & ROBBINS LLP
REED R. KATHREIN
JEFF D. FRIEDMAN
SHANA E. SCARLETT
MARIA V. MORRIS
100 Pine Street, Suite 2600
San Francisco, CA 94111
Telephone: 415/288-4545
415/288-4534 (fax)

LERACH COUGHLIN STOIA GELLER
RUDMAN & ROBBINS LLP
ERIC ALAN ISAACSON
655 West Broadway, Suite 1900
San Diego, CA 92101
Telephone: 619/231-1058
619/231-7423 (fax)

LAW OFFICE OF RICHARD R. WIEBE
RICHARD R. WIEBE
425 California Street, Suite 2025
San Francisco, CA 94104
Telephone: 415/433-3200
415/433-6382 (fax)

Attorneys for Plaintiffs

I, Reed R. Kathrein, am the ECF User whose ID and password are being used to file this NOTICE OF MOTION AND ADMINISTRATIVE MOTION TO LODGE DOCUMENTS WITH THE COURT PURSUANT TO CIVIL LOCAL RULES 7-11 AND 79-5. In compliance with General Order 45, X.B., I hereby attest that Cindy Cohn has concurred in this filing.

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